turpis ex corpore suo quæstus, l. 51. *D. De donat, inter vir. et ux.* yet that can be taken away by stronger presumptions, as are here in this case, that she had an opulent liferent out of which she could easily spare and lay aside this small sum of 1000 merks; and that it was heritable, he having declared nothing to the contrary in his bond, as certainly he would have done if it had been otherwise. The Doctor insinuated something of his wife's melancholy circumstances at that time, which moved him to comply with her humour in granting this bond. The question was, on whom the *onus probandi* fell, whether on Agnes Gray, the pursuer, that these bonds given to the Doctor were the product of her jointure, and dated before her second marriage, and bore annualrent, or if the Doctor, defender, should prove the bonds were posterior to his marriage with her, and so being *stante matrimonio*, were presumed to be made up of his means? THE LORDS repelled the first objection as to the wanting the name of the filler up of the date and witnesses; and sustained the second objection, but found it suppliable by her confirming executor to her mother; and as to the third, in this circumstantiate case, found the probation fell on the pursuer, Agnes Gray, as to the points above mentioned; on which she might get Doctor Scott's oath if she pleased. No 491.

Fol. Dic. v. 2. *p.* 257. *Fountainhall, v.* 2. *p.* 175.

SECT. IV.

Deed without witnesses, how far probative.

1611. *November* 28. LORD FORBES *against* MARQUIS of HUNTLY.

No 492.
A holograph discharge without witnesses, by a mother to her son, found not to prove its date against a singular successor in the mother's right.

MY Lord Forbes being infeft by Robert Joussie, with consent of James Curll, in the lands of Inheane, and made assignee by Robert Joussie to the contract whereby the Marquis of Huntly was obliged to infeft Robert Joussie, his heirs and assignees, in the said lands, enter him to the possession thereof at Martinmas 1593, and obtain to him Peter Mortimer's renunciation of the said lands, charged the Marquis upon the said contract. The Marquis suspended the charge for the said Mortimer's renunciation, because he had delivered it to James Curll *in anno* 1593, and reported his acquittance, all written and subscribed with his own hand. It was *alleged*, That the acquittance could not prove against my Lord Forbes, because by the act of Parliament *anno* 1540, all writs of consequence wanting witnesses were null, and this acquittance wanted witnesses. It was *replied*, That it was holograph, and so needed no witnesses. It was *answered*, That giving, and not granting that it were holograph, it

No 492. could not prove against my Lord Forbes, who was singular successor, seeing it was not his deed, and wanted the solemnity of the law. The Marquis *answered*, That his acquittance being valid in the beginning could not become invalid *ex post facto* by any subsequent assignation, disposition, or alienation, made by James Curll. The Lords having considered of the dangerous consequence, if parties alleged that writing and subscribing of writs wanting witnesses should make faith in prejudice of singular successors, and that thereby not only might the parties themselves, after that they had made alienations or assignations, for any onerous causes, make private antedated writs with their own hand, wanting witnesses, whereby they could not be improved, but also falsars and perfect writers, skillful in counterfeiting men's hand writing, might so easily falsify a man's writing, as if it might subsist without witnesses, it should never be able to be improved; they found not that acquittance alleged written and subscribed by James Curll, sufficient to verify the suspension against my Lord Forbes, being a singular successor, because it wanted witnesses, and that it was less harm that the Marquis should sustain loss by his own default, who had not provided to himself a perfect and formal security, than that the preparative of such an acquittance should be sustained.

Fol. Dic. v. 2. p. 259. Haddington, MS. No 2318.

*** Kerse mentions this case, No 19. p. 12271.

1629. *February* 12. Lo. Lesly *against* L. Boquhen and L. Pitcaple.

No 493.
A holograph letter discharging a process, found probative of its date.

In a pursuit upon a clause irritant, the Lord Lindores having set a tack of the teinds of certain lands to Boquhen, with express condition, that if he sell any of these lands, whereof he had set the teinds in tack to him, without consent of the said Lord Lindores, in that case the tack to expire, and the right of the said teinds to return to him again; after which tack Boquhen sells the said lands to Pitcaple, and thereafter the Lord Lindores makes the Lord Lesly assignee to the contract, bearing the foresaid clause and provision, and sets him a new tack of the said teinds; whereupon he, as assignee, pursues declarator of the said irritant clause against Boquhen and Pitcaple; who compearing and *alleging*, That the Lord Lindores before the making of the Lord Lesly assignee, by his missive letter all written and subscribed with his own hand, directed to the Laird of Boquhen, consented to the alienation foresaid; and the pursuer *answering*, That the consent could not be proved by a missive letter, which was a writ wanting witnesses, to work against the pursuer as assignee, except that the defender could both qualify, that the same was truly done and delivered to the defender, before the pursuer was made assignee; for albeit it be all the Lord Lindore's writing, yet that will not be enough against the assignee, see-